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Nos. 08-1498 and 09-89

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In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS
v.
HUMANITARIAN LAW PROJECT, ET AL.

HUMANITARIAN LAW PROJECT, ET AL., CROSS-PETITIONERS
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPENING BRIEF FOR HUMANITARIAN LAW PROJECT, ET AL.

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QUESTION PRESENTED

Whether 18 U.S.C. § 2339B(a)(1)'s criminal prohibitions on the provision of "training," "expert advice or assistance," "service," and "personnel" to government-designated "terrorist organizations" are unconstitutional as applied to pure speech that promotes only lawful, nonviolent activities.

PARTIES TO THE PROCEEDINGS

The following parties were plaintiffs in the district court and appellees and cross-appellants in the court of appeals, and are respondents and cross-petitioners in this Court:[1] Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangam; Tamils of Northern California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam. This brief refers to these parties as plaintiffs.

The following parties were defendants in the district court and appellants and cross-appellees in the court of appeals, and are petitioners and cross-respondents in this Court: the Attorney General of the United States, Eric Holder, Jr.; the United States Department of Justice; the United States Secretary of State, Hillary Rodham Clinton; and the United States Department of State. This brief refers to these parties as defendants.

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[1] On November 2, 2009, this Court granted the parties' motion to amend the briefing schedule. This brief therefore addresses the questions presented in both the petition (08-1498) and conditional cross-petition (09-89) for writs of certiorari.

RULE 29.6 STATEMENT

Humanitarian Law Project, Ilankai Thamil Sangam, Tamils of Northern California, Tamil Welfare and Human Rights Committee, Federation of Tamil Sangams of North America, and World Tamil Coordinating Committee have no parent corporations and there are no publicly held corporations holding any of their stock.

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OPENING BRIEF FOR HUMANITARIAN LAW PROJECT ET AL.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 552 F.3d 916. Earlier opinions of the court of appeals are reported at 393 F.3d 902, 352 F.3d 382, and 205 F.3d 1130. The opinion of the district court (Pet. App. 33a-76a) is reported at 380 F. Supp. 2d 1134. Earlier opinions of the district court are reported at 309 F. Supp. 2d 1185, 9 F. Supp. 2d 1205, and 9 F. Supp. 2d 1176.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on December 10, 2007. A petition for rehearing was denied on January 5, 2009 (Pet. App. 3a). Justice Kennedy extended the time for filing a petition for certiorari to June 4, 2009, and defendants filed a petition that day. Plaintiffs filed a conditional cross-petition for certiorari on July 6, 2009. The Court granted both petitions on September 30, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." The Fifth Amendment

provides, in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law." Relevant statutory provisions are reprinted at Pet. App. 77a-81a and in a Statutory Appendix to this brief. App. 1a-4a.

INTRODUCTION

Plaintiffs – a retired judge, a medical doctor, a human rights organization, and several nonprofit groups – seek to engage in pure political speech promoting lawful, nonviolent activity. Specifically, they would like to resume what they were doing before the statutory prohibitions at issue here were triggered: teaching and advocating the use of international law and other nonviolent means to reduce conflict, advance human rights, and promote peace. Under defendants' interpretation of 18 U.S.C. § 2339B, however, if plaintiffs communicate such ideas to, for, or with direction from an organization that the government has labeled terrorist, they risk prosecution under that statute, which makes it a crime, punishable by fifteen years in prison, to provide "training," "expert advice or assistance," "service," or "personnel" to such groups. The government has stated unequivocally that these provisions make it a crime for plaintiffs to submit an amicus brief in federal court, to petition Congress or the United Nations for legal reform, or even to speak to the media, for the benefit of a designated organization, as well as to teach such an organization human rights advocacy or English. *See infra*, pp. 12-13, 27-28.

The statute at issue employs ill-defined or undefined terms to criminalize pure speech. It proscribes speech by express reference to its content. It is triggered by the Secretary of State's selective designation of "terrorist organizations," based on criteria that are in part explicitly political. And as interpreted by the government, it imposes criminal liability on speech and association without any showing that the speaker intended to incite or promote terrorist activity in any way. Indeed, on the government's reading, the statute makes speech a crime even if the speaker succeeds in *reducing* resort to violence by encouraging peaceful resolution of conflict.

It is undisputed that both of the organizations that plaintiffs seek to speak to, for, and in coordination with – the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) – engage in a wide range of lawful, nonviolent activity, and that plaintiffs seek to further only such activity.

Thus, this case asks whether the statutory provisions are constitutional as applied to pure speech that promotes peaceable, nonviolent activity. In that light, it is essential not to be misled by the statutory language of "material support" for "terrorist organizations." That language and the image it conjures have no relevance to plaintiffs' challenge. Plaintiffs' speech in favor of human rights and peace is not *material* support in any familiar sense of that term. Nor does it promote *terrorist* activity; indeed, its purpose is to discourage violence. Accurate identification of the actual legal questions,

therefore, requires a focus on the particular provisions and specific speech at issue, rather than a general invocation of the misleading nomenclature of "material support" for a "terrorist organization."

Plaintiffs maintain that, as applied to their proposed speech, the challenged provisions are intolerably vague, discriminate on the basis of content, and penalize pure speech and association. The government has a compelling interest in combating terrorism, but as this Court has insisted, it must pursue that interest with respect for fundamental constitutional constraints. *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). This statute's sweeping criminalization of human rights advocacy and other speech fails that test.

STATEMENT

A. The Statutory Scheme

Sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, codified at 8 U.S.C. § 1189 and 18 U.S.C. § 2339B, respectively, authorize the Secretary of State to designate "foreign terrorist organizations," and make it a crime to provide certain statutorily defined "material support" for even the nonviolent and humanitarian activities of such groups.[2]

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[2] Congress amended the statute in the USA Patriot Act of 2001, Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272, 377 (2001), and again in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat.

Congress has authorized the Secretary to designate as "terrorist" any group (1) that is foreign; (2) that "engages in terrorist activity," defined to include virtually any unlawful actual or threatened use of a weapon against person or property; and (3) whose activities threaten "national security," expansively defined as the "national defense, foreign relations, or economic interests of the United States."[3] The Secretary's determination with respect to the third, expressly political "national security" criterion has been deemed a judicially unreviewable "political judgment[]." *People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104-05 (2000). The Secretary is therefore free to designate as "terrorist" any foreign group that has used or threatened to use violence based on an unreviewable assessment of whether the group advances or impairs American foreign policy or economic interests. The authority has been employed selectively; many groups that use violence, including the Palestine Liberation Organization (PLO) and the Irish Republican Army (IRA), have never been designated "terrorist." *See* Office of the Coordinator for Counterterrorism, Department of State, Foreign

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3638, 3762-64 (2004).

[3] 8 U.S.C. § 1189(a) (criteria for designation); 8 U.S.C. § 1182(a)(3)(B)(iii)(V)-(VI) (defining "terrorist activity" to include, among other things, any unlawful use of, or threat to use, a weapon against person or property, unless for mere personal monetary gain); 8 U.S.C. § 1189(d)(2) (definition of "national security"). These statutes are reproduced in an Appendix to this brief. App. 1a-4a.

Terrorist Organizations (Jul. 7, 2009), www.state.gov/s/ct/rls/other/des/123085.htm.

Once the Secretary designates a group, it becomes a crime to "knowingly provide[] material support or resources" to the group. 18 U.S.C. § 2339B(a). Incorporating the definition set out in 18 U.S.C. § 2339A(b), the statute defines "material support or resources" as:

> any property, tangible or intangible, or *service*, including currency or monetary instruments or financial securities, financial services, lodging, *training, expert advice or assistance*, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1) (emphasis added), incorporated by 18 U.S.C. § 2339B(g)(4).

The government interprets this statute to permit punishment without any proof that an individual intended, knew, or even should have known that his speech would be used for any terrorist, violent, or illicit purpose. It is enough that he knew that the group he spoke to or for the benefit of was designated or had engaged in terrorist activities. It is no defense that his speech was designed, as plaintiffs' speech is here, to *discourage* violence and to encourage lawful alternatives.

When Congress enacted the material-support statute in 1996, it declared that any "*contribution to*" a foreign organization that engages in terrorist activity "facilitates that conduct." AEDPA, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (April 24, 1996), 18 U.S.C. § 2339B note (emphasis added). At the same time, however, the statute expressly permits unlimited donations of medicine and religious materials, 18 U.S.C. § 2339A(b)(1), and provision of such other forms of support as the Secretary finds "may [not] be used to carry out terrorist activity." 18 U.S.C. § 2339B(j).

A key House Report in the legislative process states that the statute was not intended to reach protected speech and association. The Report recognizes that "[t]he First Amendment protects one's right to associate with groups that are involved in both legal and illegal activities," and insists that "[t]he basic protection of free association afforded individuals under the First Amendment remains in place" because the statute does not prohibit "one's right to think, speak, or opine in concert with, or on behalf of, such an organization." H.R. Rep. No. 104-383, at 43, 44 (1995). Quoting the Report, the government argued below, after the 2001 and 2004 amendments, that the Report still reflected Congress's intent and even added: "Congress noted that the statutory ban 'only affects one's contribution of financial or material resources.'"[4] Despite these intentions, however, Congress defined "material

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[4] First Cross-Appeal Br. for Appellants at 5-6 (CA9 filed Apr. 4, 2006) (quoting H.R. Rep. 104-383, at 44), quoted at Plaintiffs' Br. in Opp. 4-5.

support" in ways that criminalize pure speech, as this case demonstrates.

In 2004, after the courts in this case had declared the prohibitions on "personnel," "training," and "expert advice or assistance" impermissibly vague, Congress added to the statute an express recognition that application or construction of the statute might infringe First Amendment interests, and specifically disclaimed any intent to do so:

> (i) **Rule of construction.** – Nothing in this section shall be *construed or applied* so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

18 U.S.C. § 2339B(i) (emphasis added). At the same time, however, Congress added a new, undefined prohibition on the provision of "service." And Congress added definitions for the previously invalidated provisions that continue to criminalize pure speech and association, discriminate on the basis of content, and leave their scope fundamentally ambiguous.

Four prohibitions in the current version of the statute are at issue here. First, the statute prohibits the provision of "training," which Congress defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2).

Second, the statute outlaws the provision of "expert advice or assistance," which is defined as

"advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3).

Third, the statute prohibits the provision of "service" but leaves this term undefined. 18 U.S.C. § 2339A(b)(1). The government maintains that "service" broadly encompasses any "act done for the benefit of" a designated group. Pet. 17.

Fourth, the statute bars the provision of "personnel," 18 U.S.C. § 2339A(b)(1), which includes any person, including oneself, who works under an organization's "direction or control," but excludes persons acting "entirely independently" of the group:

> No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

18 U.S.C. § 2339B(h).

B. Plaintiffs' Intended Speech

Plaintiffs include the Humanitarian Law Project (HLP), a longstanding human rights organization with consultative status to the United Nations; Ralph Fertig, a retired United States administrative law judge who has served as the HLP's President; Nagalingam Jeyalingam, an American physician; and several domestic nonprofit groups that focus on the interests of persons of Tamil descent. Prior to AEDPA's enactment, the HLP and Judge Fertig had been assisting the PKK by training them in how to bring human rights complaints to the United Nations, advocating on their behalf, and assisting them in peace negotiations. Fertig Dec. ¶¶ 10-18, 24-26, 30-32 (March 9, 1998); J.A. 113-23 (describing HLP conduct prior to designation of PKK). They halted such activities once the Secretary, in 1997, designated the PKK a "foreign terrorist organization."

As the district court found, the HLP and Judge Fertig seek to

> provide training in the use of humanitarian and international law for the peaceful resolution of disputes, engage in political advocacy on behalf of the Kurds living in Turkey, and teach the PKK how to petition for relief before representative bodies like the United Nations.

Pet App. 35a; *id. at* 5a n.1. As Judge Fertig explained, he and the HLP would like, among other things, to "offer [their] services to advocate on behalf of the rights of the Kurdish people and the PKK

before the United Nations and the United States Congress." Fertig Dec. ¶ 16 (Mar. 9, 1998), J.A. 116; *see also* Fertig Dec. ¶ 19 (May 11, 2005), J.A. 98 (same). They filed this lawsuit to seek injunctive and declaratory relief that, *inter alia*, would allow them to do so without being prosecuted for providing "material support" to a designated group.

Dr. Jeyalingam and the Tamil organizations similarly seek to speak in support of the humanitarian and political activities of the LTTE, which the Secretary of State, in 1997, also designated a "foreign terrorist organization." As the district court found, the Tamil plaintiffs

> seek to provide training in the presentation of claims to mediators and international bodies for tsunami-related aid, offer legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government, and engage in political advocacy on behalf of Tamils living in Sri Lanka.

Pet. App. 35a-36a; *id.* at 5a n.1.[5]

In this case, as resolved on summary judgment, the following facts are undisputed: (1) both the PKK and LTTE engage in a broad range of lawful

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[5] As the petition notes, the LTTE was recently defeated militarily in Sri Lanka. Pet. 5 n.1. Much of the support the Tamil organizations and Dr. Jeyalingam sought to provide is now moot. However, the LTTE continues to exist as a political organization outside Sri Lanka advocating for the rights of Tamils, and plaintiffs continue to seek to support its lawful, nonviolent activities through the speech identified by the district court.

activities, including the provision of social services, political advocacy, and economic development, Pet. App. 34a-36a; (2) the PKK is the principal political organization representing the Kurds in Turkey, an ethnic minority subjected to substantial discrimination and human rights violations, *id.* at 34a-35a; (3) the LTTE is the principal political organization representing the Tamils in Sri Lanka, another ethnic minority that has been subjected to human rights abuse and discrimination, *id.* at 35a; and (4) plaintiffs intend to speak only in furtherance of *lawful and nonviolent* activities of these groups. *Id.* at 34a-36a (describing intended support).[6]

The government has made clear that it considers plaintiffs' intended activities criminally proscribed by the challenged statutory terms. At oral argument before the court of appeals, counsel for the government maintained that if plaintiffs filed an amicus brief for the LTTE in this lawsuit, advocated on the group's behalf before the United Nations, asked Congress to grant the LTTE an exemption from the statute, or provided advice on how to mediate disputes, they would be engaged in criminal activity under the statute.[7]

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[6] The government in its petition asserted that both the LTTE and the PKK engaged in terrorist activities, but plaintiffs both disputed the government's evidence and argued that these facts were immaterial. Pl. Statement of Genuine Issues in Response to Def. Mot. for Summ. Jdgmt. (July 18, 2005). Neither the district court nor the court of appeals made any finding regarding terrorist activities of either group.

[7] The tape of the oral argument is available at: http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004505. The remarks quoted above occur at 33:15, 34:30,

For example, the court asked government counsel: "If you have an attorney in the U.S. who wishes to counsel one of these organizations on how to argue their case, or how to bring their case, before the United Nations, is that a crime?" Counsel for the government replied: "Yes, your honor. We do not want U.S. persons to be assisting terrorist organizations in making presentations to the U.N., to television, to a newspaper, we do not want U.S. persons assisting these organizations except as Congress specifically has provided."[8]

C. The Decisions Below

Plaintiffs filed this action in 1998, challenging the statute on First and Fifth Amendment grounds. They asserted, among other things, that the statute's prohibitions on providing "training" and "personnel" were unconstitutionally vague. (Neither term was defined in the original 1996 statute.) The district court granted plaintiffs a preliminary and then a permanent injunction barring enforcement of those two provisions against plaintiffs' proposed activities, finding them unconstitutionally vague. *See* Pet. App. 6a-7a. It rejected plaintiffs' other challenges, including their contention that the statute infringed their right of association. *Id.* The court of appeals unanimously affirmed the preliminary injunction in

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36:00, and 41:02.

[8] *Id.* at 39:20.

2000 and the permanent injunction in 2003. *Id.* at 7a, 8a.[9]

Meanwhile, Congress amended the statute in 2001 to add another undefined prohibition on speech, barring the provision of "expert advice or assistance." Plaintiffs filed a second challenge, and in March 2004, the district court held that this provision, too, is unconstitutionally vague. *See id.* at 8a.

In September 2004, in the first case, the court of appeals granted rehearing en banc (on requests from both parties). *Id.* at 9a. While en banc review was pending, Congress in 2004 amended the statute again, providing definitions for "training," "personnel," and "expert advice or assistance," and adding a new, and undefined, prohibition on the provision of "service." *Id.* at 9a-10a. The en banc court of appeals remanded for consideration of the effect of those statutory amendments. *Id.* at 11a.

On remand, the district court held that Congress's new definition of "personnel" cured the vagueness of that provision, but that the new definition of "training" and part of the new definition of "expert advice or assistance" (concerning "specialized knowledge") were unconstitutionally vague as applied to plaintiffs' proposed speech. *Id.* at 62a-66a, 68a-69a. It also held that the new prohibition on "service" was unconstitutionally vague

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[9] *Humanitarian Law Project v. Reno (HLP I)*, 205 F.3d 1130, 1137-38 (9th Cir. 2000); *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003), *vacated and remanded in light of intervening legislation*, 393 F.3d 902 (9th Cir. 2004) (en banc).

as applied to plaintiffs' speech. *Id.* at 66a-68a. The district court rejected plaintiffs' remaining contentions. *Id.* at 46a-60a, 69a-74a.

Both parties appealed, and the court of appeals once again unanimously affirmed. It reasoned that the constitutional "requirement for clarity is enhanced" where, as here, a criminal statute touches on "sensitive areas of basic First Amendment freedoms." *Id.* at 20a (internal quotations omitted). It emphasized that it was addressing the provisions' vagueness only as applied to plaintiffs' intended speech. *Id.* at 2a, 22a n.6, 5a n.1 (describing plaintiffs' proposed speech).

With respect to "training," the court found it "highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for tsunami-related aid, one is imparting a 'specific skill' or 'general knowledge.'" *Id.* at 21a-22a. Stressing that the term as defined "could still be read to encompass speech and advocacy protected by the First Amendment," *id.* at 22a, the court held that

> the term "training" remains impermissibly vague because it "implicates, and potentially chills, Plaintiffs' protected expressive activities and imposes criminal sanctions of up to fifteen years imprisonment without sufficiently defining the prohibited conduct for ordinary people to understand."

Id. at 22a-23a (quoting *id.* at 64a).

The court noted that the prohibition on "expert advice or assistance" similarly encompasses protected speech or advocacy. *Id.* at 24a. It held that the prohibition on advice or assistance "derived from ... other specialized knowledge" was impermissibly vague, *id.* at 23a-24a, but it upheld the prohibition on advice or assistance "derived from scientific [or] technical ... knowledge." *Id.* at 24a. The court offered no reasoning for upholding this aspect of the statute, and merely cited school reading lists that identified "technical" as a fifth-grade vocabulary word and "scientific method" as a third-grade vocabulary word. *Id.*

The court also deemed vague, as applied, the prohibition on "service," which Congress left undefined, but which defendants have stated applies to anything done "for the benefit of" a designated group. *Id.* at 25a (adopting district court's holding and reasoning at *id.* at 66a-68a).

The court of appeals agreed with the district court that the amended definition of "personnel" cured that term's prior vagueness. *Id.* at 26a-27a. The court rejected plaintiffs' other claims, including the contention that the statute imposed guilt by association in violation of the First and Fifth Amendments, and that the statute should be narrowly construed to apply only to speech intended to further an organization's illegal activities. *Id.* at 13a-19a; *id.* at 27a-32a.[10]

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[10] Plaintiffs initially sought to provide a broader range of humanitarian assistance to the PKK and the LTTE, but plaintiffs at this stage pursue only their challenge to the provisions as applied to speech promoting lawful, nonviolent

SUMMARY OF ARGUMENT

This case presents a narrow, but critically important, question: does Section 2339B comport with the Constitution insofar as it criminalizes pure speech promoting lawful, nonviolent activities – here, core political speech, including human rights advocacy and peacemaking? Plaintiffs argue that as applied to such speech, the statutory prohibitions on providing "training," "expert advice or assistance," "service," and "personnel" are unconstitutional because they are vague, penalize protected speech and association, and impermissibly discriminate on the basis of content.

The narrow focus of plaintiffs' claims in this Court means that the case does *not* involve the propriety of banning financial or other tangible support to terrorist organizations. Nor does it involve speech advocating or teaching *criminal* or *violent* activity. Plaintiffs here seek only to safeguard their right to promote lawful, nonviolent activities through pure speech.

I. The fact that plaintiffs seek to engage in pure speech, of a political character, advocating only lawful, nonviolent activities, colors all of the constitutional analysis here. The right to engage in peaceable political speech is at the very core of the First Amendment, and government attempts to

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activities, as described by the district court and court of appeals. Pet. App. 5a n.1; *id.* at 35a-36a. Plaintiffs read the injunction affirmed by the court of appeals as limited to protecting only that speech.

criminalize such speech warrant the Court's most skeptical scrutiny.

II. The challenged provisions are unconstitutionally vague. Criminal prohibitions affecting speech demand "precision of regulation." *NAACP v. Button*, 371 U.S. 415, 438 (1963). These provisions are the antithesis of precise. The prohibition on "training," for example, requires plaintiffs to distinguish between "specific skills" and "general knowledge," "classic terms of degree" strikingly similar to those this Court has previously declared unconstitutionally vague. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991). To decide whether their speech is proscribed as "expert advice," they must discern whether it is "derived from" general knowledge or instead from "scientific, technical, or other specialized knowledge" – a distinction likewise far too uncertain and context-dependent to support criminal sanctions.

To decide whether an appeal to Congress or the United Nations is a prohibited "service," plaintiffs must distinguish between speaking "on behalf of an organization," which the government claims is permissible, and speaking "for the benefit of" the organization, which the government contends is a crime. And to avoid punishment for the provision of "personnel," plaintiffs must guess what level of coordination or association with a designated group denies them protection for "entirely independent" activity and triggers the prohibition on acting at an organization's "direction."

Each of these inquiries, moreover, is further complicated by the fact that the provisions overlap in internally contradictory ways. The "training" and "expert advice" definitions appear to permit teaching or advice based solely on "general knowledge," but such teaching or advice would violate the "service" prohibition if done for the group's benefit. The "personnel" prohibition carves out "entirely independent" activities, but neither teaching nor advice could be "entirely independent" by their nature. Even independent activities would be a prohibited "service" if done for the organization's benefit. Muddying the waters still further, the government claims that there is an unwritten exemption for "independent advocacy" that applies across the whole statute, but would not allow "any collaboration or other relationship between the giver and the recipient." Pet. 22.

The courts below correctly deemed the prohibitions on "training," "service," and "expert advice or assistance" "derived from specialized knowledge" impermissibly vague as applied, because they fail to afford plaintiffs any clear guidance as to what speech is criminally prohibited. The same conclusion, however, also holds for the prohibitions on "personnel" and "expert advice or assistance" "derived from scientific [or] technical ... knowledge." All four provisions are therefore impermissibly vague as applied to plaintiffs' speech. Indeed, the provisions are so vague that they render the statute facially overbroad, for they appear to penalize not just plaintiffs' speech, but virtually all speech promoting lawful activity when communicated to, for, or at the direction of a designated group.

III. Wholly apart from their vagueness, the challenged provisions are unconstitutional as applied because they flatly prohibit pure speech promoting lawful, nonviolent ends, and because they discriminate on the basis of content. The statute's terms draw facially content-based distinctions between "specific skills" and "general knowledge"; between "scientific, technical, or other specialized knowledge," and all other knowledge; between "religious" and nonreligious materials. As the government defines "service," that term discriminates on the basis of viewpoint. It prohibits speech "for the benefit of" a designated group, but permits speech critical of the group. And the statute's penalties expressly turn on whether speech is associated with a favored or disfavored political organization. The identical speech on human rights is permissible if communicated to, for the benefit of, or at the direction of, the PLO, which has never been designated, but proscribed if made to, for, or at the direction of the PKK.

The challenged provisions cannot survive strict scrutiny. Prohibitions of pure speech are presumptively invalid. And "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). While national security is a compelling interest, the government has not shown that it is necessary to prohibit speech promoting peaceable, nonviolent activity to serve that end. Indeed, this Court has repeatedly ruled that otherwise lawful expression and association may not be criminalized in order to

forestall others from engaging in illegal conduct. *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

IV. The challenged provisions also violate plaintiffs' right of association. All four provisions do so, as noted above, by penalizing speech only when it is communicated to, for the benefit of, or at the direction of selectively disfavored organizations. And the "service" and "personnel" provisions directly penalize association wholly apart from their discriminatory application. Virtually any action one might take in conjunction with a designated organization could be viewed as done for its "benefit," and therefore a prohibited "service." And if, as the government maintains, acting in collaboration with a group forfeits any protection for "independent advocacy," the statute directly penalizes association. Congress may not criminally punish association, however, absent proof of specific intent to further an organization's illegal ends. As interpreted by the government, the statute contains no such requirement, and is therefore invalid.

V. The provisions cannot be upheld under the intermediate scrutiny standard established in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *O'Brien* applies only to *content-neutral* regulations of expressive *conduct*. It is categorically inapplicable to statutes that penalize pure speech or association, or discriminate based on content. In any event, the provisions would not survive intermediate scrutiny, as they prohibit vastly more speech than is necessary to serve any legitimate interest in national security.

VI. Finally, the Court can avoid all of the foregoing constitutional questions by interpreting the statute to require proof of intent to further an organization's illegal ends where, as here, pure speech and association are at stake. Congress specified that the statute should not be "construed or applied" to violate the First Amendment. Interpreting the statute to require specific intent where it is applied to pure speech and association would fully support, on statutory grounds, the injunctive and declaratory relief plaintiffs seek, and thereby permit the Court to avoid the constitutional questions raised here.

This is the same route the Court followed in *Scales v. United States*, 367 U.S. 203 (1961), when it faced another statute that on its face appeared to impose wide-ranging penalties on speech and association because of the illegal ends of a "terrorist organization." The government's alternative construction, which would exempt only "independent advocacy," would not avoid the constitutional questions presented here. The First Amendment protects more than the abstract right to speak "independently," but also the right, asserted here, to speak to others, in association with others, and at the direction of others.

This Court has warned that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536 (plurality). This principle applies to Congress, too, and has particular importance for the statute at issue here, which is not limited to times of emergency or war, or to groups that have attacked

the United States or Americans. Where, as here, Congress has expressly directed that its law is not to be applied in ways that violate the First Amendment, where no financial or tangible support is at issue, and where the government has not shown that criminalizing purely peaceable expression is necessary to the nation's security, plaintiffs' proposed speech must be protected.

ARGUMENT

I. PLAINTIFFS' INTENDED ACTIVITIES ARE PURE POLITICAL SPEECH ENTITLED TO THE HIGHEST FIRST AMENDMENT PROTECTION

Plaintiffs propose to engage in pure speech addressing political issues, which this Court has long held is entitled to the First Amendment's highest protection. The political character of plaintiffs' speech is clear: they seek to lobby Congress, to teach and advise on human rights, to promote the peaceful resolution of political disputes, and to advocate for the human rights of minority populations represented by the designated organizations. Pet. App. 5a n.1; Fertig Declarations, J.A. 91-126. Congress's criminalization of such speech as applied here warrants application of the First Amendment's most stringent safeguards.

"[L]awful political speech [is] at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003). "Core political speech occupies the highest, most protected position" constitutionally accorded to speech. *RAV v.*

City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); *First National Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (political speech "is at the heart of the First Amendment's protections").[11] Because political speech warrants such heightened protection, this Court has stated that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 347 (1995) (citation omitted).

Here, plaintiffs' proposed activities are not only political but constitute pure speech. They do not seek protection for conduct engaged in for expressive purposes, but for speech itself. The Court has insisted that pure speech warrants the highest protection, and has refused to apply relaxed scrutiny to criminal bans on pure expression. *See, e.g., Cohen v. California*, 403 U.S. 15, 18 (1971) (treating conviction for wearing jacket with offensive message as based on pure speech, and subjecting it to heightened scrutiny); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (same for conviction based on "pure expression" under Georgia rape shield law). *See infra*, Point V.A.

In considering each of plaintiffs' legal challenges, therefore, the fact that the statute as applied here

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[11] *See also Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); T. COOLEY, CONSTITUTIONAL LIMITATIONS *421-22 (5th ed. 1883); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); Sunstein, *Free Speech Now*, in THE BILL OF RIGHTS IN THE MODERN STATE 304-07 (G. Stone, R. Epstein & C. Sunstein eds. 1992).

criminalizes pure political speech must trigger the Court's most skeptical review.

II. THE PROVISIONS ARE VAGUE AS APPLIED TO PLAINTIFFS' INTENDED SPEECH

Congress defined "material support" to reach well beyond mere financial support and the provision of tangible goods. By their terms, and as the government has interpreted them, the criminal prohibitions implicate a broad range of pure speech: "training" in any "specific skill"; "expert advice"; speaking, writing, or petitioning Congress or the United Nations "for the benefit of" a designated group; and coordinating one's speech with a group in such a way as to act under its "direction or control." These prohibitions fail to offer plaintiffs sufficiently clear guidance as to whether and to what extent their proposed speech is in fact prohibited.

A statute is vague if it causes "men of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The degree of precision required increases with the gravity of the penalty and the importance of the rights at stake. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (higher standard applicable for criminal statutes and when speech at stake). Under well-settled law, the material-support provisions at issue here are subject to the most stringent vagueness scrutiny for two reasons: they impose severe criminal sanctions, and they trench on speech and

associational rights. *Id.*; *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997); *Baggett v. Bullitt*, 377 U.S. 360, 372-73 (1964).[12] All four provisions require ordinary persons to guess at their meaning. They fail to draw the clear lines mandated by the Constitution where speech may trigger criminal sanctions.

A. Training

The prohibition on "training" requires individuals to draw impossible distinctions between prohibited instruction in a "specific skill" and permissible instruction in "general knowledge." To determine whether their proposed teaching of human rights advocacy or peacemaking is proscribed, for example, plaintiffs must guess at whether they would be imparting "specific skills" or merely "general knowledge." If they guess wrong, they face up to fifteen years in prison.

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[12] In its petition, the government maintained that "the material-support statute does not regulate speech," and therefore does not warrant heightened vagueness scrutiny. Pet. 13. That is simply false. As demonstrated above, all of plaintiffs' proposed activities are pure speech. *See supra*, Point I. When a statute prohibits "training," defined as "*instruction or teaching*," "expert *advice*," and any advocacy done "for the benefit" of a designated group or under its "direction or control," it directly criminalizes speech. The government conceded as much in the lower courts, where it admitted that the statutory provisions would criminalize, among other things, the teaching of political geography or English, lobbying the United Nations and Congress, writing amicus briefs, and advocating for a designated group's benefit on television or in the print press. *See supra*, pp. 12-13; *infra*, p. 27-28.

The difficulty is that "general knowledge" and "specific skills," much like "general" and "elaborated," are "classic terms of degree," and as such, provide "no principle for determining when ... remarks pass from the safe harbor of the general to the forbidden sea of the [specific]." *Gentile v. State Bar of Nevada*, 501 U.S. at 1048-49 (holding unconstitutionally vague a state bar rule that allowed lawyers to make "general" remarks on pending criminal cases, but barred them from "elaborating").

The government's own attempts to explain the distinction suffice to establish its inescapable vagueness. Before the court of appeals, counsel for the government opined that, under this definition, teaching geography would be permissible because it constitutes "general knowledge," but teaching the political geography of terrorist organizations would constitute a banned "specific skill," as would the teaching of English.[13] But what if, during a "general" course on geography, a student's question prompted a discussion of the political geography of terrorist organizations? What if the course included a session on the science of geography, or the

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[13] The colloquy took place during the en banc oral argument, at approximately 49 minutes into the argument. *See* Recording of En Banc Oral Argument, Dec. 14, 2004, available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004506. At the time of oral argument, Congress had passed the 2004 amendments, but President Bush had not yet signed them into law. *See* Statement by President George W. Bush Upon Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 40 Weekly Comp. Pres. Doc. 2985 (Dec. 17, 2004). Government counsel nonetheless addressed the new law's definitions in the colloquy above.

geography of a specific region incorporating statistical information? An ordinary person could only hazard a guess as to whether these are impermissible "specific skills," or permissible aspects of "general knowledge."

In the district court, government counsel similarly illustrated the profound difficulty of understanding the "training" prohibition. Defendants asserted in their brief that plaintiffs were free to advocate "on behalf of" the PKK before the United Nations or "any forum of their choosing," even though they simultaneously asserted that any activity done "for the benefit of" a designated group would be a proscribed "service." Govt. Mem. in Supp. of S.J. at 17 n.8, 21 (July 17, 2005). When the district court at oral argument asked whether plaintiffs could lobby the U.N. on the PKK's behalf, government counsel first said that they could do so. D. Ct. Tr. 7-8, C.A. Supplemental Excerpts of Record (SER) 218-19. When the court asked whether plaintiffs could meet with members of the PKK to discuss a strategy for lobbying the U.N., and then divide up into groups to carry it out, however, counsel opined that such conduct "presumably could" constitute prohibited "training," D. Ct. Tr. 11, C.A. SER 220, and minutes later stated that it "clearly comes within the proscriptions against training and expert advice or assistance." D. Ct. Tr. 15; C.A. SER 224. At the close of the colloquy, the district court concluded, "I don't know how you think anyone, a normal person, would figure this out based on this exchange." D. Ct. Tr. 19, C.A. SER 228.

B. Expert Advice or Assistance

The ban on providing "expert advice or assistance" is vague for many of the same reasons. It, too, directly criminalizes speech, and forces plaintiffs to guess whether any aspect of their advice could be said to "derive[] from scientific, technical, or other specialized knowledge." The vagueness infects the entire prohibition, not just the "specialized knowledge" component.

Notably, the statute requires individuals to determine, not simply whether their speech is itself "technical," "scientific," or "specialized," but, even more ambiguously, whether its content in any way "*derives from*" scientific, technical, or other specialized knowledge. Virtually all knowledge might be thought to *derive from* scientific, technical, or some other specialized knowledge, yet Congress plainly intended some limit. The statute provides no coherent or reliable way to make the distinction.

The courts below correctly invalidated the "specialized knowledge" portion. Like "general" and "elaboration," "specialized" is a "classic term of degree," and fails to afford notice of what is prohibited. *Gentile*, 501 U.S. at 1048-49. Judge Fertig could not risk providing advice about presenting human rights claims to the United Nations unless he was certain that his advice was derived from "general knowledge" and included no statement informed by "specialized knowledge." But how does one distinguish which aspects of human rights derive from general as opposed to specialized knowledge? And because providing advice generally

involves a conversation, how can one know whether one's responses to questions might stray into a subject that could be said to be "derived from ... specialized knowledge" (or, for that matter, "scientific [or] technical" knowledge)? A large share (perhaps most) of general knowledge consists of "specialized knowledge" that has come to be widely known, so is literally "derived from" specialized knowledge. How are plaintiffs to tell the difference?

Having correctly deemed the ban on advice "derived from ... specialized knowledge" to be unconstitutionally vague as applied to plaintiffs' speech, the courts below erroneously upheld the ban on advice "derived from scientific [or] technical ... knowledge." No sound rationale supports the latter conclusion. Indeed, the court of appeals proffered no rationale, but merely cited two sources indicating that "technical" and "scientific method" are fifth-grade and third-grade level vocabulary words, respectively. Pet. App. 24a.

This misconceives the duty of a court in assessing a vagueness challenge. The question is not whether the terms are widely known, but whether they provide sufficient notice of what is prohibited in the context of a criminal law trenching on First Amendment rights. Many words on grammar school vocabulary lists would not pass that test, or even more lenient tests of vagueness. *See Coates v. Cincinnati*, 402 U.S. 611 (1971) (declaring vague a city ordinance banning "annoying" behavior). "Monstrous," "tremendous," "awesome," "incredible," "intense," and "dreadful" are all on a third-grade vocabulary list, but would hardly be permissible

terms to specify prohibited activity in a criminal statute.[14] Indeed, the word "specializes," which the court rightly deemed vague (in the form, "specialized"), is on one of the fourth grade lists from the same source the court cited.[15]

The "expert advice" prohibition leaves citizens without meaningful guidance, and gives prosecutors and juries broad discretion to target unpopular speech. *See Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972). In one common usage, what knowledge is "technical" or "specialized" will depend entirely on what one's assumed audience already knows or remembers or how much effort will be required to take it in. High school algebra, for example, might be "technical" or "specialized" for one audience, but "general knowledge" for another. So, too, speech addressing human rights, lobbying, or public relations could be deemed to involve "general knowledge" or instead to derive from "technical" and "specialized" knowledge, depending on the sophistication of the audience. Speech that might or might not be proscribed based on its potential effect on a listener is clearly vague, for the speaker has no way of gauging listeners' reactions. *See Federal Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 494-95 (2007).

Webster's Third New International Dictionary (1993) defines "technical" to mean, *inter alia*: (1) "having special us[ually] practical knowledge

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[14] Houghton Mifflin Reading Spelling and Vocabulary Word Lists, www-kes.stjohns.k12.fl.us/wordlists/3rd/vocab3.htm.

[15] *Id.*, www-kes.stjohns.k12.fl.us/wordlists/4th/vocab5.htm.

especially of a mechanical or scientific subject," (2) "marked by or characteristic of specialization," (3) "of or relating to a particular subject," and (4) "of or relating to technique." *Id.* at 2348. It defines "specialized" to mean, *inter alia*, "designed or fitted for use or employment in one special line (as of occupation)." *Id.* at 2186. Virtually all advice could be said to "derive" from knowledge relating to a "particular subject," "technique," "line," or "occupation." Congress meant to excise *something* when it carved out advice derived from non-specialized knowledge, but the language it employed offers little guidance.

"Scientific" also leaves vast room for uncertainty. The term means "of, relating to, or used in science." *Id.* at 2032. "Science," in turn, means, *inter alia*: (1) "possession of knowledge as distinguished from ignorance or misunderstanding," (2) "a branch or department of systematized knowledge that is or can be made a specific object of study;" or (3) "knowledge classified and made available in work, life, or the search for truth." *Id.* Debates rage about when, or the extent to which, disciplines have become "scientific" (economics? psychology? geography? political science?). Would advice on presenting torture claims to a human rights tribunal be barred because assessing whether someone has been the victim of torture may in part derive from "scientific" or "technical" knowledge? Would advice for peace negotiations that addressed such issues as allocation of natural resources, energy use, transportation, or voting and representational arrangements be barred as derived from scientific or technical knowledge?

The government has defended the statutory definition by noting its similarity to the definition of "expert testimony" under Rule 702 of the Federal Rules of Evidence. Pet. 15. But here, as elsewhere in the law, "context matters." *Gonzales v. O Centro Espiritu Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006); *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). That a particular standard may suffice as a guide to discretionary judgment calls made by trained judges (who do not risk going to jail for a mistake) does not mean that it can be imposed on the general public on pain of fifteen years' imprisonment. *See* Pet. App. 66a (finding that Rule 702 "does not clarify the term ... for the average person with no background in the law"). It cannot seriously be doubted that a statute making it a crime to publish anything derived from "scientific, technical, or other specialized knowledge" would be unconstitutionally vague – just as would a statute making it a crime to publish information whose prejudicial or confusing character outweighed its probative value, even though that, too, is a standard routinely applied by judges. Fed. R. Evid. 403.

Moreover, the "expert advice or assistance" definition is radically more open-ended than Rule 702. It requires citizens to guess not only at what constitutes scientific, technical, or other specialized knowledge, but at what is "derived" from such knowledge, an even more capacious and ambiguous category.

C. Service

The most expansive provision in the definition of "material support" is the prohibition on providing any "service" to a designated group, which Congress added in 2004 without supplying a definition. The courts below correctly held this prohibition unconstitutionally vague, as it provides literally no guidance as to what speech is prohibited or permitted.

Citing a dictionary, the government maintains that the term prohibits any "act done for the benefit ... of another." Pet. 17. But how does one determine whether a speech, for example, about the human rights of Kurds is done "for the benefit of" the PKK? What about a letter to the State Department objecting to the detention on political grounds of a PKK member? When the *New York Times*, *Washington Post*, and *Los Angeles Times* published op-ed essays by Hamas spokespersons in the past two years, were they violating the law by providing a "service" to a designated group?[16]

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[16] *See* Mousa Abu Marzook, *Hamas Speaks*, L.A. Times, Jan. 6, 2009, at A15 (by deputy of the political bureau of Hamas); Mahmoud al-Zahar, *No Peace Without Hamas*, Wash. Post, Apr. 17, 2008, at A23 (by founder of Hamas and foreign minister in Hamas led government); Ahmed Yousef, *What Hamas Wants*, N.Y. Times, June 20, 2007, at A19 (by political adviser to Hamas leader Ismaiel Haniya); Ahmed Yousef, *Engage With Hamas, We Earned Our Support*, Wash. Post, June 20, 2007, at A19. Hamas is a designated "foreign terrorist organization." www.state.gov/s/ct/rls/other/des/123085.htm.

At the same time that the government contends that "service" prohibits anything done "for the benefit of" a designated group, it also contends that advocating "on behalf of the PKK" is permitted (so long as one also avoids acting at "the direction of" the proscribed group, which would constitute the provision of "personnel"). Govt. Mem. in Supp. of S.J. at 17 n.8; *see also* D. Ct. Tr. 7; C.A. SER 218. Thus, Judge Fertig and the HLP must attempt to distinguish between speaking "on behalf of" the PKK, which is assertedly permissible, and speaking "for the benefit of" the PKK, which is a crime. The government has yet to explain how speech on an organization's behalf would not also be for its benefit. Yet a fifteen-year criminal sentence could turn on the distinction.

The "service" prohibition also forces individuals to guess whether joining or affiliating with a group is prohibited. Before the "service" prohibition was added in 2004, the government represented that citizens were free under the material-support statute to join designated groups, and that concession was critical to the court of appeals' rejection of plaintiffs' right-of-association challenge. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133-34 (9th Cir. 2000) (rejecting First Amendment right-of-association challenge because the statute permits membership and affiliation with foreign terrorist organizations). But with the statute's new ban on "service," membership and affiliation are now in doubt. A reasonable person could readily understand any joining or affiliating with a political organization to be "for [its] benefit." How can one distinguish between ostensibly permitted membership and

association, on the one hand, and "service," on the other? Such confusion is intolerable where, as here, criminal prosecution for activities protected by the First Amendment is at stake.

D. Personnel

Two separate panels of the court of appeals unanimously held that the statute's original ban on providing "personnel" criminalized protected speech and was unconstitutionally vague. *See supra*, note 9. After Congress amended the provision in 2004 to limit "personnel" to persons acting under a recipient organization's "direction or control," while exempting "entirely independent" activity, the court held that the "personnel" ban sufficiently apprises individuals of the proscribed zone. Pet. App. 26a-27a.

The amended definition of "personnel," however, continues to leave the statute's reach intolerably vague. "Direction or control" could mean many things of potential, but uncertain, applicability to the speech plaintiffs propose. The fact that Congress drafted a narrow exception only for "*entirely* independent" activity leaves citizens wondering whether the prohibition covers all or just some parts of the vast gray area between complete control and complete independence, encompassing myriad forms of coordination, collaboration, consultation, and communication.

For example, what if Judge Fertig offered his legal services to work with the PKK in presenting a human rights petition to the U.N.? A lawyer might well be said to act under the "direction" of his client,

as, subject only to professional obligations, the client's wishes are controlling. But when this very issue arose in the prosecution of a lawyer under the "personnel" provision, the government opined that a lawyer acting as "house counsel" would be acting impermissibly under the organization's "direction or control," but an outside counsel doing the same work could be seen as "independent." *United States v. Sattar*, 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003). The court in *Sattar* concluded that such distinctions were too unclear to pass muster, and declared the "personnel" ban unconstitutionally vague. *Id.*[17]

If plaintiffs wanted to write an op-ed essay defending the PKK and criticizing its designation as "terrorist," would coordinating the drafting with a PKK leader constitute criminal acceptance of "direction"? A reasonable person might fear that such collaboration would negate a claim that the essay was written "entirely independently." What if the author accepted three of the leader's five editorial suggestions, or only two? What if the author coordinated with the PKK the timing of the essay's submission for publication? Any coordination at all might risk prosecution.

For related reasons, the "personnel" provision is vague with respect to associational rights. It does

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[17] The *Sattar* case preceded the 2004 amendment to the "personnel" prohibition, but the government in that case maintained that the "personnel" prohibition should be construed as limited to action under a designated group's "direction or control." *See Sattar*, 272 F. Supp. 2d at 360. Government counsel's explication therefore remains relevant to the meaning of the amended statute, which expressly adopted the "direction or control" limitation.

not provide an adequate distinction between membership in or affiliation with a designated group, which the government has said the statute permits, *cf. HLP I*, 205 F.3d at 1134, and providing the group with "personnel," which is a crime. In the *Sattar* case, the government was unable to articulate any coherent distinction between the two actions:

> When asked at oral argument how to distinguish being a member of an organization from being a quasi-employee, the government initially responded "You know it when you see it." ... While such a standard was once an acceptable way for a Supreme Court Justice to identify obscenity, see *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring), it is an insufficient guide by which a person can predict the legality of that person's conduct. See *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002) ("It is not enough to say that judges can intuit the scope of the prohibition if [the defendants] could not.")

Sattar, 272 F. Supp. 2d at 359-60. The amended definition does nothing to clarify how one can associate with a designated group without acting in some respect under its "direction or control." Plaintiffs reasonably fear that any affiliation or collaboration may render them criminally liable.

E. The Interaction of the Provisions Exacerbates Their Vagueness

The confusion generated by each of the above prohibitions is exacerbated by their interaction. The

provisions, read together, are hopelessly contradictory, or at least their collective meaning is so muddled as to leave would-be speakers uncertain about what is forbidden. Similar contradictions have supported invalidation for lack of constitutionally required fair notice even when speech was not at issue. *See, e.g.*, *United States v. Cardiff*, 344 U.S. 174, 176-77 (1952); *Raley v. Ohio*, 360 U.S. 423, 438 (1959).

For example, the "service" prohibition appears to conflict with the narrowing limitations Congress simultaneously placed in the definitions of "training," "expert advice," and "personnel." Teaching a subject of "general knowledge" or providing advice derived from non-specialized knowledge is expressly carved out of the "training" and "expert advice" provisions, but if done "for the benefit of" a designated group it would appear to be prohibited as a service. (Indeed, what training or advice would not be done "for the benefit of" the group?) Similarly, the "personnel" definition exempts acts done "entirely independently of the ... organization to advance its goals or objectives," 18 U.S.C. § 2339B(h), but such activity could reasonably be thought to be "for the benefit of" the organization, and therefore simultaneously proscribed by the "service" prohibition.

Congress specifically provided that the statute should not be construed or applied to outlaw protected speech, *id.* § 2339B(i), but publishing an article praising the humanitarian work of a designated organization to improve its reputation would be simultaneously protected speech and

presumably a service done "for the benefit of" the organization. Is it, then, criminal or not? One can only guess.

Likewise, training or legal advice on a subject of "general knowledge" would presumably not be a crime under the definitions of "training" and "expert advice," but would be a crime if its provision involved coordination with the group that amounted to acting under its direction.

Navigating through the internally contradictory signals of these overlapping provisions is simply impossible. Reading the provisions together, a would-be speaker would find it a mystery what Congress thought it was prohibiting and permitting.

F. The Government's Defense of the Challenged Provisions Fails to Account for the Fact that They Criminalize Pure Speech

Rather than attempt to answer the many questions raised about the meaning of the challenged terms, the government in its petition merely cited inapposite examples from contexts where First Amendment interests and/or criminal penalties were *not* at stake. Pet. 13-18. But as noted above, vagueness standards are at their most demanding when a criminal prohibition affects speech. *Reno v. American Civil Liberties Union*, 521 U.S. at 871-72. Many of the cases the government cited do not even address vagueness, and all arise from non-speech or non-criminal contexts that tolerate more lenient vagueness standards – determining an appropriate

attorney's fee (Pet. 15),[18] admitting expert evidence in court (Pet. 16),[19] prohibiting the overseas transfer of money (Pet. 17)[20] or heavy equipment (Pet. 18),[21] or noncriminal regulation of public employees' speech (Pet. 14).[22] These cases have no bearing on

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[18] *Pierce v. Underwood*, 487 U.S. 552, 572 (1988), involved the standards employed for awarding statutory attorneys' fees. It presented no vagueness challenge, and did not involve a criminal statute at all, much less a prohibition of speech.

[19] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999), did not address any vagueness issue, and as noted above, involved the very different setting of evidentiary standards for judicial governance of a trial.

[20] *United States v. Homa Int'l Trading Corp.*, 387 F.3d 144, 146 (2d Cir. 2004) (holding that transferring money for a fee was undeniably a service, where no issues of speech were raised).

[21] *United States v. Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 73-77 (2d Cir.), *cert. denied*, 479 U.S. 1018 (1986), upheld a conviction for shipping construction equipment to Iran in violation of a complete ban on such transactions. No speech or associational rights were at stake. Defendants made what the court characterized as a "tortured" argument that a separate provision of the statute, governing "service contracts," should be construed to create a loophole permitting what the statute plainly forbade. The court rejected that interpretation as wholly inconsistent with the plain meaning of the statute's flat ban, and accordingly also rejected defendants' related argument that the statute, as they had tortuously construed it, was unconstitutionally vague.

[22] The government's one cited authority involving speech is *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001). There, the court rejected a facial vagueness challenge to a law that required public school teachers to use English predominantly in their instruction. In that context, involving the somewhat curtailed speech interests of public employees in public schools and no apparent criminal penalties,

plaintiffs' challenge, which tests the validity of terms used to criminalize pure political speech. In the present setting, the demand for clarity is at its zenith, because otherwise citizens will be forced to steer clear of anything approaching the prohibited zone, and free speech will be the loser. That the statutes at issue have deterred plaintiffs for so long from providing training and assistance in human rights and peacemaking, and from advocating on behalf of disadvantaged ethnic minorities, illustrates that the dangers of vague prohibitions are all too real.

G. The Provisions Are Overbroad Because Their Application to a Substantial Amount of Speech Is Unclear

For the foregoing reasons, the provisions at issue are vague as applied to plaintiffs' proposed speech. The same arguments also support a broader conclusion, namely, that the vagueness of the terms as applied to *all* speech renders the provisions facially invalid.

While there is undoubtedly a small fraction of pure speech that could constitutionally be prohibited, such as incitement to crime, the statute makes no attempt to limit its application to such speech. Instead, it prohibits *all* speech that constitutes

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the court explained that the law made clear that "instruction" was tied to the "curriculum," and on that basis found no substantial number of instances where there would be doubt about when English had to be used (for classroom presentation of the curriculum), and when it did not (in private conversations with students and parents).

"training," "expert advice," "service," or "personnel." These provisions are profoundly unclear in what they prohibit, not just as applied to plaintiffs' proposed speech, but as applied to a seemingly limitless range of teaching, advice, and advocacy of lawful activity, all of which is constitutionally protected. *See infra*, Point III. The vagueness of the provisions as applied to this wide variety of speech renders the statute substantially overbroad on its face; indeed, the apparent prohibitions of protected speech dwarf their application to unprotected speech. *See United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) (noting that "in the First Amendment context, [we] permit[] plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech"); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

III. THE CHALLENGED PROVISIONS IMPERMISSIBLY CRIMINALIZE PURE SPEECH AND DISCRIMINATE ON THE BASIS OF CONTENT

The challenged provisions independently violate the First Amendment because they impermissibly criminalize pure political speech advocating lawful, nonviolent activity, and discriminate on the basis of the speech's content.[23] Throughout this litigation,

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[23] Plaintiffs argued below that the material-support statute as a whole, as well as the specific provisions at issue here, were invalid as applied and on their face because they were content-based and overbroad penalties on speech, and because they imposed guilt by association, in violation of the First and Fifth Amendments. The court of appeals rejected those contentions. Plaintiffs have preserved the arguments, and they are independent bases for affirming the injunction below, and for

the government has never cited, and we are unaware of, any authority from this Court upholding such blanket criminalization of pure political speech that seeks to further only lawful, nonviolent activities.

Three features of the challenged provisions as applied here are critical to the First Amendment analysis. First, as noted above, plaintiffs' proposed speech is pure political speech. *See supra*, Point I. Human rights advocacy, peacemaking, petitioning for redress of grievances, and advocacy on behalf of ethnic minorities are at the core of what the First Amendment protects.

Second, the challenged provisions impose a complete criminal prohibition on such speech. The challenged provisions do not constitute a zoning regulation, a regulation of the time, place, or manner of speech, or a regulation of conduct – expressive or otherwise. Rather, they work a complete ban of certain kinds of constitutionally protected speech.

Third, the provisions discriminate based on content, favoring or disfavoring speech depending on whether it imparts "specific skills" or "general knowledge," is "for the benefit of" a group, or consists of "religious materials" or non-religious materials. And all of the provisions selectively prohibit speech only when it is communicated to, at the direction of, or for the benefit of particular political organizations.

These factors trigger the most stringent scrutiny, and the provisions manifestly fail that scrutiny.

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expanding it as plaintiffs request in their cross-petition.

A. Strict Scrutiny Applies Because the Challenged Provisions Criminally Proscribe Pure Political Speech

Despite the use of the term "material support," 18 U.S.C. § 2339B is not limited to barring financial support, tangible goods, and the like. Rather, its criminal sanctions extend to pure speech itself. And according to the government, the statute's prohibitions reach even speech that is designed to *discourage* terrorism and to promote only lawful, nonviolent activities. Only a "'need ... of the highest order'" can justify "a regulation of pure speech." *Bartnicki*, 532 U.S. at 532, 526; *Cox Broadcasting*, 420 U.S. at 495 (applying strict scrutiny to statute penalizing "pure expression"); *Cohen v. California*, 403 U.S. at 18-19 (applying strict scrutiny to conviction for pure expression).

The fact that the statute imposes a complete criminal ban rather than a time, place, or manner regulation underscores the need for exacting scrutiny. This Court has applied more relaxed scrutiny to laws that impose content-neutral restrictions on the time, place, or manner of speech, but do not criminalize it altogether. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1999) (upholding restriction on volume of speech in public park as "time, place, or manner" regulation where it was content-neutral and left open ample alternative avenues for expression). The provisions challenged here criminalize plaintiffs' speech altogether, thereby triggering the First Amendment's most skeptical scrutiny. *City of Los Angeles v. Alameda Books, Inc.*,

535 U.S. 425, 443 (2002) (plurality) ("[A]n ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban."); *id.* at 445 (Kennedy, J. concurring) (same).

Here, the statute flatly bans certain kinds of speech *to* designated organizations, *e.g.*, training of or advising their members. Such a ban on speech to a chosen audience, indeed willing listeners, triggers strict First Amendment scrutiny.[24] Similarly, nothing less than strict scrutiny can apply to a law that criminally punishes, as a "service" or provision of "personnel," speech advocating peaceable nonviolent activity that is delivered for a designated organization's benefit, or under its direction. *See De Jonge v. Oregon*, 299 U.S. 353 (1937), discussed *infra* pp. 53-55.

The fact that the statute reaches speech that implicates foreign affairs does not reduce the need for stringent First Amendment review. *Boos v. Barry*, 485 U.S. 312 (1988) (striking down regulation barring demonstrations that criticized foreign governments within 500 feet of a foreign embassy). Political speech is central to self-government, *Whitney v. California*, 274 U.S. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), and self-government includes foreign as well as domestic

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[24] *FCC v. League of Women Voters of California*, 468 U.S. 364, 384 (1984) (ban on editorializing denies "the right to address *their chosen audience* on matters of public importance") (emphasis added); *McConnell v. FEC*, 540 U.S. 93, 335 (2003) (Kennedy, J., concurring in part and dissenting in part) (a law "that would allow a speaker to say anything he chooses, so long as his intended audience could not hear him," would be "unconstitutional under any known First Amendment theory").

affairs. International communications are a central aspect of the robust public debate that the First Amendment is designed to protect. *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (protecting First Amendment rights of Americans to receive Communist literature from abroad).

B. Strict Scrutiny Applies Because the Provisions Discriminate on the Basis of Content

Laws that discriminate on the basis of content, even if they do not impose criminal bans, also trigger the Court's most stringent scrutiny. "A statute is presumptively inconsistent with the First Amendment" if it discriminates against "speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115 (1991); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) ("Since [the law] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.").

"[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by its content, then it is content based." *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring); *FCC v. League of Women Voters of California*, 468 U.S. 364, 383 (1984) (finding ban on "editorializing" content-based because authorities "must necessarily examine the content of the message that is conveyed to determine whether the views expressed" are proscribed).

Most of the challenged provisions discriminate on the basis of content in obvious ways. The "training" ban prohibits instruction or teaching where its content consists of imparting "specific skills," but not "general knowledge." *Cf. Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (state law that imposed tax on "general interest" magazines but not professional, trade, sports, and religious magazines was content-based). The "expert advice" ban criminalizes the giving of advice only when its content "derives from scientific, technical, or other specialized knowledge." And the "service" ban, as the government reads it, prohibits speech expressed "for the benefit of" a designated group, but not speech that criticizes the group. At the same time, the statute expressly favors speech with religious content, permitting unlimited donations of "religious" but not secular materials. 18 U.S.C. § 2339A(b) (exempting "medicine or religious materials" from the material-support ban).

All the challenged provisions, moreover, including the "personnel" provision, discriminate in an additional way. They punish speakers for speech communicated to, for the benefit of, or directed by certain organizations but not others, with the government making the selection based on inherently political assessments about whether a group's activities are consistent with United States "foreign policy" or "economic interests." Just as statutes that discriminate against selected speakers are suspect,[25] so, too, is the discrimination as to a

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[25] *See, e.g., Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 190 (1999) (government cannot

speaker's chosen audience, beneficiary, or director here. This is a form of content discrimination: speech to, for the benefit of, or under the direction of the PKK is treated as pro-PKK, and therefore criminalized, whereas otherwise-comparable speech to, for the benefit of, or under the direction of the PLO, no matter how pro-PLO, is allowed.[26]

Just as a law banning speech to or for the benefit of the Republican Party while permitting the same speech to or for the benefit of the Democratic Party would be content-based, so, too, is a law that selects the PKK, LTTE, and other groups from among countless similar organizations around the world on

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restrict advertising for private casinos while allowing advertising for tribal casinos); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983) (a tax that "singled out the press for special treatment" is unconstitutional); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("we have frequently condemned ... discrimination among different users of the same medium for expression."); *Bellotti*, 435 U.S. at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.") (citing *Mosley*, 408 U.S. at 96).

[26] Government counsel made this content-discriminatory purpose clear at oral argument before the court of appeals. Asked whether filing an amicus brief on behalf of the LTTE in this case would be a crime, counsel replied, "Yes because Congress wants these organizations to be radioactive. ... We don't want U.S. lawyers, other U.S. persons, to be saying, 'Yeah, I want to help them in a *good* way,' because that adds to the goodwill and the standing of the organization." C.A. Oral Argument Tape, *supra* note 7, at 34:30. The government's concern, in other words, is with speech that sends a message that a disfavored organization is legitimate and deserves goodwill.

expressly political grounds, and then proscribes speech that sends messages that promote those groups' "goodwill." *See supra*, note 26.

The government argues that the statute is content-neutral because it is motivated by the legitimate purpose of deterring terrorist activity. Pet. 19-20. But the asserted legitimacy of the government's motive does not change the fact that the statute contains provisions that are content-based on their face. A law that banned all speech praising terrorism would indisputably be content-based, even if it were motivated by the same purpose of deterring terrorist activity. The "assertion of a content neutral purpose [is not] enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Simon & Schuster*, 502 U.S. at 117 ("[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment").[27]

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[27] *Hill v. Colorado*, 530 U.S. 703 (2000), does not alter this conclusion. In *Hill*, the Court upheld a law that regulated the manner in which speakers could approach individuals within 100 feet of a health care facility. The Court viewed the law as a reasonable time, place, and manner restriction, emphasizing that it was content-neutral, only regulated the manner in which speech could be expressed to unwilling listeners, and left ample alternative channels for communication. *Id.* at 719-30. Over dissents, the majority deemed the statutory language, addressing "oral protest, education, or counseling," as equivalent to a neutral regulation of "picketing." *Id.* at 721. Here, by contrast, the challenged provisions impose a complete ban, not a regulation of the manner of speech, and the ban is expressly content-based. Indeed, in over ten years of litigation, the government has never even sought to defend the challenged provisions as a "time, place, or manner" regulation.

C. The Challenged Provisions Cannot Survive Strict Scrutiny

"When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995). Content-based laws may be upheld only where the government establishes that the particular content distinctions drawn are "the least restrictive means" to further a compelling state interest. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Importantly, the Court has repeatedly held that pure political speech like plaintiffs', advocating peaceable, nonviolent ends, may *not* be criminalized in order to forestall others from engaging in illegal conduct, even where that illegal conduct threatens national security.

While combating terrorism is undoubtedly a compelling state interest, the government has not shown that criminalizing pure political speech advocating peaceful, lawful activities is necessary to further that interest. Nor has it pointed to anything in the legislative record – in 1996, in 2001, or in 2004 – that reflects a specific congressional focus on such speech, let alone a determination that banning it is necessary or, even, advisable. The congressional expressions of concern to protect speech suggest the contrary. *See* Statement, *supra*, p. 7. There is simply no evidence in the litigation or legislative records to show that criminally proscribing speech promoting peaceable, lawful conduct will further the

interest in reducing terrorist activity at all, much less that it is *necessary* to do so.

In defending the statute's prohibitions on financial support, the government below relied on the notion that money is "fungible," so that support for lawful activities might free up resources that the recipient organization can use for terrorist activity. But that theory, about *money*, has no application to the speech at issue in this as-applied challenge. Indeed, the 1996 congressional "finding" that the government relies upon is by its terms limited to "contributions." *See* Statement, *supra*, p. 7. And if the finding were applied to speech advocating lawful, nonviolent activity, it would deserve no deference, as it lacks any evidentiary support. *See Bartnicki*, 532 U.S. at 530-31 & n.17 (dismissing congressional finding advanced to support statute criminalizing speech because "the relevant factual foundation is not to be found in the legislative record").

More importantly, the Court has repeatedly rejected the proposition that otherwise-lawful speech may be prohibited in order to deter criminal conduct by a third party. In *Bartnicki*, for example, the Court held unconstitutional a civil statute that penalized the publication of illegally intercepted cell phone conversations as applied to an individual who had obtained the communications legally (from someone else who had illegally intercepted them). The Court rejected the government's attempt to justify the statute on the ground that it would deter illegal interceptions by others: "It would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order

to deter conduct by a non-law-abiding third party." *Id.* at 529-30. Similarly, plaintiffs' speech, advocating only lawful, nonviolent activities, cannot be proscribed on the basis of mere speculation that such a prohibition might somehow deter the PKK or the LTTE from engaging in terrorist activity.

Similarly, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court struck down a federal statute banning "virtual child pornography," and rejected the government's argument that the restriction was necessary because such materials might be used to seduce children, or might increase demand for child pornography using actual children. As the Court explained, "the government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Id. at* 253 (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curiam*)). Here, as in *Free Speech Coalition*, "the harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id.* at 250.

This principle dates back to some of the Court's earliest First Amendment decisions. In *De Jonge v. United States*, 299 U.S. 353, the Court invalidated a conviction under a criminal syndicalism statute of an individual who spoke on behalf of the Communist Party at a meeting held under Party auspices, at which he sought to recruit members to the Party. The Court accepted that the Party engaged in illegal activities, and that De Jonge acted under the Party's auspices, but held that he could not be convicted because he advocated only "peaceable" activity. *Id.*

at 365. The Court noted that if individuals are "engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy." *Id.* But, the Court continued, "it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *Id.*

In *NAACP v. Claiborne Hardware*, 458 U.S. at 908-09, 932-34, the Court relied on *De Jonge* to hold that the leader of and participants in an economic boycott could not be held liable for illegal violence that attended the boycott absent proof that they engaged in or directly incited the violence. *Id.* at 928 ("[W]hen an advocate's] appeals do not incite lawless action, they must be regarded as protected speech.").

Even where speech directly advocates criminal conduct, the Court has held that it may not be penalized unless it is in fact intended and likely to produce "imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Hess v. Indiana*, 414 U.S. at 108-09 (holding that the First Amendment prohibits application of a disorderly conduct statute to pure speech that, while advocating illegal activity, did not incite it). If the government is not permitted to penalize direct advocacy of *illegal* activity except in circumstances where it constitutes incitement to imminent crime, surely it cannot criminalize plaintiffs' proposed speech, which promotes only lawful, peaceful activities, and does not urge criminal conduct of any kind.

The government will not be deprived of its considerable arsenal of legal tools to combat terrorism if the limited provisions at issue here are invalidated as applied to speech advocating peaceable, nonviolent action. Indeed, given Congress's statement that the material-support statute may not be "construed or applied" in ways that violate the First Amendment, 18 U.S.C. § 2339B(i), it is doubtful that Congress even intended to criminalize such speech. *See infra*, Point VI. Plaintiffs' requested relief would leave the statute in place, to be employed against those providing material support in the form of financial aid and other non-speech support, as well as against those whose speech is unprotected. In addition, the government would still be able to invoke other laws to prosecute those who support terrorist activity, conspire to engage in terrorist activity, or aid or abet such activity.[28] The government has made no showing that any successful prosecution under § 2339B would have been prevented if speech advocating lawful, nonviolent activity were protected.

In short, the government has utterly failed to meet its heavy burden of justification under strict scrutiny.

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[28] *See, e.g.*, 18 U.S.C. § 2339A (prohibiting material support of terrorist crimes); 18 U.S.C. § 2339C (prohibiting financing of terrorism with knowledge that the funds will be used for specific offenses); 18 U.S.C. §§ 1961-68 (Racketeering Influenced and Corrupt Organizations Act); 18 U.S.C. § 2 (aiding and abetting); 18 U.S.C. § 371 (conspiracy).

IV. THE CHALLENGED PROVISIONS VIOLATE THE RIGHT OF ASSOCIATION

The challenged provisions also violate the right of association. As discussed above, the challenged provisions penalize speech only when it is communicated to, for the benefit of, or under the direction or control of disfavored associations. *See supra*, Point III.B. This association-based trigger for penalizing speech violates the First and Fifth Amendments. In addition, the "service" and "personnel" provisions directly penalize association because, as noted above, the mere act of joining or associating with a group could be viewed as benefiting the group or acting at the group's "direction." *See supra*, Point II.C-D.

This Court has confronted similar penalties triggered by association with disfavored organizations before. In the 1950s, Congress imposed analogous restrictions on the Communist Party, after expressly finding that it was a foreign-dominated organization that used terrorism and other illegal means in seeking to overthrow the United States by force and violence.[29] This Court did not question Congress's findings regarding the Communist Party's illegal ends and terrorist means, but nonetheless insisted that the First and Fifth

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[29] Congress found that there "exists a world Communist movement ... whose purpose it is, by treachery, deceit, infiltration ... espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." 50 U.S.C. § 781 (West 1991) (repealed 1993), quoted in *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 n.8 (1964).

Amendments precluded any penalty for association with the Communist Party unless an individual *specifically intended* to further its *unlawful* ends.[30]

De Jonge v. Oregon, discussed above, demonstrates that the principle fully applies to active association with organizations engaged in illegal activity. The Court there unanimously reversed De Jonge's conviction for his active participation in a gathering held under the Communist Party's auspices, because De Jonge's activities did not promote illegal conduct:

> [P]eaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose.

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[30] *See, e.g., United States v. Robel*, 389 U.S. 258, 262 (1967) (holding that the government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (applying same principle to criminal statute). The same principle applies to other organizations. *See NAACP v. Claiborne Hardware*, 458 U.S. at 920.

299 U.S. at 365. *See also NAACP v. Claiborne Hardware*, 458 U.S. at 908-09 (relying on *De Jonge* to hold that those who participated in the lawful aspects of an economic boycott could not be held liable for injuries caused by illegal, violent aspects of the boycott).

Here, as in *De Jonge*, plaintiffs seek to engage in lawful peaceable speech and association. The challenged provisions criminalize their speech solely because of its association with organizations that have been proscribed, like the Communist Party, for their illegal activities (coupled with political considerations). *De Jonge* establishes, however, that the government may not proscribe peaceable expression and association because of the nature of the group with which an individual speaks and associates.

The government attempts to distinguish these precedents on the ground that the material-support law penalizes the conduct of material support, not association itself. Pet. 19. But that rationale is inapplicable to the provisions as applied here, which penalize not conduct, but *pure speech*. Plaintiffs seek to protect only pure speech, and thus the provisions as applied here penalize no conduct at all. *See supra* pp. 17, 23-24.

The fact that the challenged provisions simultaneously target speech and association makes them doubly invalid. Speech nearly always involves some associational element, in that speakers speak *to* listeners, and, particularly when it comes to

political expression, often speak *in association with* others. *NAACP v. Claiborne Hardware*, 458 U.S. at 908 ("'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.'") (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

Here, the statute selectively criminalizes speech on the basis of the association of speaker and listeners. According to the government, the statute requires no showing of intent to further a designated group's unlawful activities. As applied to plaintiffs' intended speech, therefore, the challenged provisions violate this Court's long-established principle that association may not be penalized absent proof that an individual specifically intended to further an organization's illegal ends.

V. *O'BRIEN* IS NOT APPLICABLE AND WOULD NOT SAVE THE CHALLENGED PROVISIONS AS APPLIED TO PLAINTIFFS' PROPOSED SPEECH

The government has incorrectly suggested that the challenged provisions are sustainable as a content-neutral regulation of conduct under *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Pet. 19-20. The *O'Brien* intermediate scrutiny standard does not apply in this case for three reasons: (1) as applied, the challenged provisions regulate not conduct, but pure speech; (2) they do so on content-based grounds; and (3) they directly infringe

expressive association. In any event, the provisions as applied here would not satisfy intermediate scrutiny, because the government cannot establish that penalizing plaintiffs' pure speech promoting peaceable, nonviolent activities is remotely tailored to serve any legitimate interest.

A. *O'Brien* Is Inapplicable

The Court has applied *O'Brien*'s intermediate standard of review to laws that regulate conduct directly, but incidentally affect expression connected with the regulated conduct. In *O'Brien* itself, the Court upheld a regulation that prohibited the destruction of draft cards as applied to an individual who burned his draft card to protest the war. 391 U.S. at 369. The government had a legitimate, speech-neutral reason for preserving draft cards to sustain the orderly functioning of the selective service. *Id.* at 380. The fact that O'Brien sought to violate the law to make a political point did not render the prohibition of his conduct invalid, where the government's interest in regulating the conduct was unrelated to expression. *Id.*

That reasoning is inapplicable here for multiple reasons. First, *O'Brien* is limited to regulation of expressive *conduct*. *Texas v. Johnson*, 491 U.S. 397, 406 (1989) ("[G]overnment generally has a freer hand in restricting expressive *conduct* than it has in restricting the *written or spoken word*") (emphasis added). Thus, the *O'Brien* standard by its terms would not apply to a ban on *speech* opposing the draft. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring) ("The four-part

enquiry described in *United States v. O'Brien*, judg[es] the limits of appropriate state action burdening expressive acts *as distinct from pure speech or representation*") (emphasis added) (citation omitted).

In *Cohen v. California*, 403 U.S. 15 (1971), for example, involving a conviction for wearing a jacket with an offensive anti-draft expression, the Court rejected application of *O'Brien* or any other lower form of scrutiny, because Cohen was penalized not for his conduct, but for "communication":

> The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a *conviction resting solely upon 'speech,'* not upon any separately identifiable conduct ....

Id. at 18 (emphasis added).

Similarly, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court refused to apply the *O'Brien* standard to Georgia's rape shield law, stating:

> The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition.

Id. at 495 (citing *O'Brien*, 391 U.S. at 376-77).

The fact that *other* aspects of the statute prohibit conduct does not make *O'Brien* applicable to the provisions at issue here. If the regulation in *O'Brien* had banned not only draft card destruction, but also speech critical of the draft, a prosecution for an anti-draft speech would not have triggered *O'Brien* intermediate scrutiny. In order for *O'Brien* to apply at all in an as-applied challenge, the law in question must be applied to conduct, not speech itself. But plaintiffs' proposed activities are pure speech.

Second, *O'Brien* is limited to content-neutral laws, and the provisions challenged here discriminate on the basis of content. In *Texas v. Johnson*, 491 U.S. at 402-03, for example, the Court declined to apply *O'Brien* to a law banning flag desecration because it concluded that the law discriminated on the basis of content. Where, as here, a statute on its face targets expression based on its content, the government's interest cannot be said to be "unrelated to the suppression of free expression," a critical threshold requirement for *O'Brien* scrutiny. *O'Brien*, 391 U.S. at 377.

Third, *O'Brien* does not apply where, as here, a law directly regulates expressive association. In *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000), the Court held *O'Brien* inapplicable where a state's general ban on discrimination in public accommodations was applied to the Boy Scouts in a way that "directly and immediately affects associational rights" (by restricting its ability to

choose who would serve as a scoutmaster). As the Court explained:

> A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable.

Id. at 659. The Court similarly rejected the invocation of *O'Brien* to defend patronage practices because they directly regulated pure association. *Elrod v. Burns*, 427 U.S. 347 (1976). As the Court explained, "*O'Brien* dealt with the constitutionality of laws regulating the 'nonspeech' elements of expressive conduct. No such regulation is involved here, for it is association and belief *per se*, not any particular form of conduct, [that is at issue]." *Id.* at 363 n.17.

As in *Elrod* and *Dale*, so here, the application of the law directly infringes plaintiffs' rights of expressive association. It "directly and immediately" precludes them from engaging in speech in association with the PKK or the LTTE. *O'Brien* therefore does not apply.

The government argued below that the material-support law is analogous to laws this Court has upheld restricting trade and travel with particular foreign nations. *See, e.g., Regan v. Wald*, 468 U.S.

222 (1984). But the trade and travel regulations are critically different. They regulate *conduct* (travel and financial transactions), not pure speech. So while an individual who engages in the *conduct* of proscribed trade or travel for expressive purposes would find his challenge analyzed under *O'Brien*, the provisions as applied here criminalize pure speech and association. In *Regan v. Wald* itself, the Court pointedly distinguished the permissible "general ban on travel to Cuba" from impermissible efforts to "selectively ... deny passports on the basis of political affiliation" with the Communist Party, struck down in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), and *Kent v. Dulles*, 357 U.S. 116 (1958). *See Regan*, 468 U.S. at 241. Thus, intermediate scrutiny is not applicable here.

B. The Challenged Provisions Could Not Survive Even Intermediate Scrutiny

Were the Court to apply intermediate scrutiny, the challenged provisions would still fail. *O'Brien* holds that a regulation of conduct that incidentally affects speech will be sustained:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The provisions as applied here fail intermediate scrutiny because – even aside from their being anything but unrelated to the suppression of expression[31] – they "burden ... more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. While intermediate scrutiny does not demand that the government use the least restrictive means to further its ends, it still must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting*, 512 U.S. at 664. Without evidence that speech advocating wholly lawful, nonviolent ends furthers terrorism, the government has not met its burden of showing the requisite fit between these provisions and its legitimate national security interests, even under the more lenient *O'Brien* standard.

VI. THE COURT CAN AVOID THESE CONSTITUTIONAL PROBLEMS BY INTERPRETING THE STATUTE TO PROHIBIT ONLY SPEECH INTENDED TO FURTHER UNLAWFUL ENDS

In the courts below, plaintiffs argued that the statute should be interpreted to prohibit only speech intended to further a group's illegal ends. The lower courts declined to adopt such an interpretation with respect to the statute as a whole. But adopting such

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[31] The Court in more recent cases has treated the criterion that a measure be "unrelated to the suppression of expression" as a threshold requirement for application of *O'Brien* at all, and accordingly plaintiffs addressed it above. *See supra*, Point V.A.

an interpretation with respect to the provisions challenged here would be consistent with Congress's directive that the statute not be "construed or applied" in a way that would violate First Amendment rights. 18 U.S.C. § 2339B(i). Such an interpretation would also fully support the relief plaintiffs seek, while avoiding substantial constitutional questions. *Jones v. United States*, 526 U.S. 227, 239 (1999) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (internal citations omitted).[32]

A. The Statute Should Be Interpreted to Require Proof of Intent to Further a Designated Organization's Illegal Ends

The Court can avoid the constitutional problems identified above if it interprets the challenged provisions to require proof of intent to further the designated organization's illegal activities when applied to pure speech and association. This Court adopted precisely that interpretation of the Smith Act in *Scales v. United States*, 367 U.S. 203 (1961). The relevant language of the material-support statute is, if anything, even more susceptible to such an interpretation than the Smith Act.

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[32] The construction plaintiffs propose, requiring proof of intent to further a group's terrorist activities, would not necessarily *save* the statute's constitutionality in every context, but because it would fully protect plaintiffs here, it would permit the Court to *avoid* resolution of a constitutional question.

The Smith Act criminalized "membership" in organizations that advocated violent overthrow, "knowing the purpose thereof." 18 U.S.C. § 2385. The statute did not by its terms require intent to further the group's illegal aims. Yet to avoid due process and First Amendment concerns, the Court interpreted the statute to require, not merely the knowledge of the group's purposes specified on the face of the statute, but also "'specific[] inten[t] to accomplish [the aims of the organization] by resort to violence.'" *Scales*, 367 U.S. at 229 (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

On its face, the material-support statute also criminalizes "knowing" provision of training, expert advice, service, and personnel, and raises similar constitutional concerns. Here, as in *Scales*, the Court can avoid those constitutional questions by interpreting the statute to require proof of intent to further a designated organization's illegal ends.

The court of appeals declined to adopt this interpretation. It reasoned that the statute in *Scales* was "silent as to *mens rea*," whereas 18 U.S.C. § 2339B includes a requirement that defendants "know" that the organization they are supporting is designated "terrorist" or has engaged in violent activities. The court concluded that it would be inconsistent with Congress's requirement of "knowledge" of the group's terrorist character to also require "intent" to further the group's illegal activities. Pet. App. 16a.

Contrary to the court of appeals' reasoning, however, the Smith Act interpreted in *Scales* was not silent on *mens rea*. Like 18 U.S.C. § 2339B, it required "knowing" support. This Court nonetheless concluded that to preserve the statute's constitutionality, it should be interpreted to require specific intent to further the Party's illegal ends. A heightened intent requirement, to avoid constitutional difficulties, is thus consistent with an express "knowing" requirement.

With respect to § 2339B, there is both statutory language and legislative history to support this narrowing construction – neither of which existed in the Smith Act. Congress expressly invited such an interpretation when, aware that courts had identified constitutional flaws in the statute, it provided in 2004 that the statute should not be "construed or applied" in a manner that would violate the First Amendment. 18 U.S.C. § 2339B(i).

When Congress first enacted the statute, moreover, it stated that it sought to prohibit material support "to the fullest possible basis, consistent with the Constitution." AEDPA, § 301(b), 18 U.S.C. § 2339B note. The bill's sponsor, Senator Orrin Hatch, stated in introducing the Conference Report that:

> [t]his bill also includes provisions making it a crime to knowingly provide material support *to the terrorist functions* of terrorist groups designated by a Presidential finding to be engaged in terrorist activities. ... I am satisfied that we have crafted a narrow but effective

> designation provision which meets these obligations *while safeguarding the freedom to associate.*[33]

To interpret the challenged provisions here to include a specific intent requirement when speech and association are at issue would accord with the Court's treatment of the Smith Act in *Scales*, honor Congress's express directive that the statute not be "construed or applied" so as to violate the First Amendment, and ensure that the law did precisely what the bill's sponsor said it would: criminalize support "to the terrorist functions of terrorist groups ... while safeguarding the freedom to associate."

B. The Government's Proposed Statutory Construction Would Not Avoid the Constitutional Questions

The government proffers an alternative construction, which would interpret the statute simply to exempt "independent advocacy." Pet. 21. This construction, however, would not avoid the constitutional problems with the statute or resolve the dispute over plaintiffs' proposed speech. Pure political speech of the type in which plaintiffs seek to engage is protected not merely when it is done "independently," but also when it is done in conjunction with others.[34] Activities such as writing,

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[33] 142 Cong. Rec. S3354 (daily ed. April 16, 1996) (statement of Sen. Hatch) (emphasis added) (quoted in *HLP II*, 352 F.3d at 402).

[34] *See Dale*, 530 U.S. at 647 ("'[I]mplicit in the right to engage in activities protected by the First Amendment' is 'a

speaking, and teaching do not lose their First Amendment protection when done in coordination with others. Bob Woodward, for example, does not forfeit his First Amendment rights because he writes under the direction of his Washington Post editors. Nor did Communist Party members lose their First Amendment protections because they protested and demonstrated at the direction of a foreign-dominated organization. *See supra*, note 30 (citing cases).

To protect political speech only when it is undertaken "independently" would strike at the core of political speech, which almost necessarily involves associational expression. The government's notion of "independent advocacy" would not seem to exempt speaking *to*, or *in collaboration with*, members of the organization, as plaintiffs propose to do here. Thus, the proffered interpretation would not permit the Court to avoid plaintiffs' constitutional challenge.

Moreover, the government's proposed construction would introduce even further confusion to an already vague statute. Citizens would have to guess at whether their activities were "independent," or involved "some collaboration or other relationship between the giver and the recipient." Pet. 22. Would checking facts with a PKK official on a human rights complaint constitute a "collaboration or other relationship" warranting criminal sanctions? Virtually any effort to communicate with a designated group regarding one's advocacy could be

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corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'") (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

viewed as forfeiting independence and entering a "collaboration or other relationship." The government's proposed "construction" would not cure the provisions' many infirmities, but would only further muddy the waters.[35]

In short, the Court can avoid the constitutional issues presented here only by adopting plaintiffs' proposed construction, much as it did in *Scales*.

CONCLUSION

For all of the above reasons, the Court should affirm the court of appeals' decision with respect to the provisions it held invalid as applied to plaintiffs' speech, and reverse the court's decision with respect to the provisions it upheld.

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[35] The government's construction also is in considerable tension with the statutory language as the government itself reads it. The government would create an exemption from the entire statute for "independent advocacy," despite the fact that Congress did not do so, but only created a more limited exemption, from the "personnel" prohibition alone, for "entirely independent" activity. 18 U.S.C. § 2339B(h). And it would exempt advocacy that, even if independent, would seemingly be "for the benefit of" a designated group, the standard the government has advanced to interpret the "service" ban.

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APPENDIX

APPENDIX

1. 8 U.S.C. §§ 1182(a)(3)(B)(iii) and (iv) provide as follows:

(iii) "Terrorist activity" defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere

personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined. As used in this Act, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

2. 8 U.S.C. §§ 1189(a) and (d)(2) provide in relevant part as follows:

Designation of foreign terrorist organizations

(a) Designation.

(1) In general. The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—

(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)][)] or terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism[)]; and

(C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

* * * * *

(d) Definitions. As used in this section—

* * * * *

(2) the term "national security" means the national defense, foreign relations, or economic interests of the United States;